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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

LAWRENCE F. BROWN, M.D.,
Petitioner,
vs.
NATIONAL MEDICAL ENTERPRISES,
NME HOSPITALS, INC. and KEVIN JENKINS, D.O.

PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION TWO

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

SUMMARY OF ARGUMENT

State action violating the Fourteenth Amendment consisted of the California Court of Appeal's introduction of fictions imposing a comprehensive set of forfeitures upon Petitioner. Those fictions gave the false impression of justification for the trial court's judgment and the Court of Appeal's ruling affirming it. Those judicially imported fictions consisted of misrepresentations that no termination of clinical privileges had occurred, and that no right to a hearing existed.

The Court of Appeal's ruling in approving the trial court's grant of summary judgment, also sealed the fate of discovery motions including petitioner's Motion to Compel which had been pending in the trial court. That motion emphasized discovery on the prime issue of whether the ouster of petitioner was racially imposed.

As soon as the Court of Appeal Opinion and Judgment issued, applying those fictions, petitioner presented the federal questions raised thereby — prominently concerning violation of federal constitutional law — to the California Supreme Court. Petitioner also invoked federal statutory law in his Petition for Review to the Supreme Court, specifically the Health Care Quality Improvement Act, 42 U.S.C. § 11101 *et seq.*, presented in Appendix D of the Petition for Writ of Certiorari.

Specifically, Petitioner sought relief in the California Supreme Court on the ground that the state actions on the judicial side violated the Fourteenth Amendment's right to due process of law and right to equal protection of the laws. Further, Petitioner invoked the ground that the state acts violated the peer review public policy requirement of the aforesaid federal health statute. (Petition for Review, Appendix A9 herein.)

Petitioner here shows that this Court has jurisdiction, that violations of federal constitutional and statutory law occurred, and that the federal and especially Fourteenth Amendment questions are raised and supported.

I.

RESPONDENTS' DENIALS NOTWITHSTANDING: PETITIONER MADE AMPLE AND, INDEED, EXTENSIVE PRESENTATIONS TO THE COURTS BELOW, OF THE FEDERAL CONSTITUTIONAL GROUNDS FOR THIS COURT'S JURISDICTION AND OF THE FEDERAL QUESTION.

Due process is a federal right under the Fourteenth Amendment. So is equal protection of the laws. In the

course of the summary judgment motion in the trial court, Petitioner showed that the Respondents had assured him in writing that in the event that the quality of services of this physician were challenged, he would be entitled to proceed under due process protection. (See Appendix C1-3 herein, CT 957-959; CT 995.) Petitioner "identified as one of the disputed issues whether the property and liberty right that is owed by the hospital is protected where the *hospital ousts him from the department so that he can no longer exercise those privileges.*" (Emphasis added.) The corporate hospital Respondents took shelter under its threadbare and fictitious excuse that it did not physically strike his name from the clinical privileges record!

Petitioner denied defendants' assertion that since the contract with plaintiff expired of its own terms, he cannot assert any cause of action. (Appendix D herein.) He pointed out that his rights have no connection to any contract or its renewal or nonrenewal. He showed (Appendix D1-2, CT 1367, 1370) that the defendants admit that not only do the bylaws protect the plaintiff, but so also does the protective standard of due process, which the bylaws embrace. [1] (Appendix D2)

And, in its letter of December 15, 1978 to petitioner, "NME admits [that the] privileges are inalienable and therefore require adherence to . . . *due process* for any stripping of clinical privileges from plaintiff" (emphasis added). (Appendix D2, CT 1371) "The defendants

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[1] In the 1980 agreement with Petitioner, Respondents admit that they were held to a due process standard. CT 945 at 950: "In the event any dispute shall arise concerning the quality of professional services being rendered hereunder [by Petitioner] the parties agree . . . that no such dispute shall be resolved without regard to the due process provisions of the bylaws of the medical staff and the governing board."

knew they were breaking the law . . . and that "nothing in the 'contract' permitted them to bar plaintiff from Radiology . . . ." They knew that the "privileges . . . could not be removed . . ." except by procedures (of calling a due process and bylaw-bases hearing) which they admitted they had not done and had no intention of doing. *Id.* Letter to Petitioner dated December 15, 1987, Exhibit 25. Also, the admissions ". . . that the privilege could not be removed except by full hearing and due process procedures as prescribed, are found . . . in the Leyhe (NME vice-president's) testimony. . . ." And the contrary ". . . assertion by the defendants is worse than hollow." (Appendix D2-3, CT 1381; Appendix F1, CT 1428 — quoting from petitioner's Separate Statement opposing the Summary Judgment motion.)

Petitioner's further laying of the foundation for this Court's writ — within petitioner's response to the Motion for Summary Judgment — invoked the federal constitutional law principle that "The summary adjudication /judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should be used with great caution." *Logan* In addition, in contesting the Motion for Summary Judgment he argued that the *United States Constitution, Amendment Fourteenth, itself, becomes part of the caution*, by its provision: ". . . nor shall any State deprive any person of . . . liberty or property, without due process of law . . . including the right to a trial — a right reaching all the way back to article 39 of Magna Carta." (Emphasis added.) Citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). (Appendix D3, CT 1399)

Thus petitioner raised the Fourteenth Amendment Constitutional provisions and federal statute. The Court of Appeal received the Clerk's Transcript record

showing those petitioner's federal law responses to the summary judgment motion.

Then, after the Court of Appeal wrought its fiction-based Opinion that there had been no termination of petitioner's privileges and that petitioner had no right to a hearing, the petitioner responded at the California Supreme Court level — by petitioning that court for review showing applicable Federal Constitutional, statutory and case law. Petitioner explicitly raised his federal rights and the violations thereof as follows:

One: In the Petition for Review to the Supreme Court of California, petitioner set forth that "This [California Supreme] Court has established . . . [citing cases] that physician's hospital privileges . . . are fundamental vested rights protected by . . . the *due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution* [citing *Ascherman I, Anton, Westlake, Miller, Ascherman II, Applebaum, Bergeron,* and *Sams v. Ohio Valley Hospital Assn* (4th Cir. 1969) 413 F.2d 826, and *Marin v. Citizens Memorial Hospital,* 700 F.Supp. 354] that hospitals cannot, therefore, terminate those privileges without a fair quasi-judicial hearing . . ." (Appendix A1-2)

"Thus, under that body of doctrine, Petitioner had, in common with other physicians, *a property and liberty right to exercise his privileges that was vested, fundamental, and inalienable except by due process* . . . hearing . . ." (Emphasis added.) (Appendix A2)

Two: As shown in Appendix A, pages 7-8, petitioner in his Petition for Review to the California Supreme Court argued as follows: "[T]he Court of Appeal has, through the extension of . . . fictional reasoning of such cases . . . enforced . . . forfeiture of Petitioner's vested property right in his staff privileges *without due process of law, in violation of the Fourteenth Amendment to the*

United States Constitution." *viz, Shelley v. Kraemer* (1948) 334 U.S. 1. (Emphasis added.)

As was the case in *Shelley*, the instant Petitioner, a black physician, alleged and asserted that Respondents acted on racial motivation to deprive him of his property rights, whereas the Court of Appeal, by and through its fictional findings that Respondents did not terminate Petitioner's staff privileges and that Petitioner was not entitled to a hearing, has *thereby violated federal Due Process and Equal Protection rights under the Fourteenth Amendment* — certainly no less than the state court in *Shelley* violated the Fourteenth Amendment and laid the groundwork for the grant of the writ of certiorari to that ousted black victim. The California Court of Appeal, by its ruling and opinion has validated that deprivation, that violation. (Appendix A7)

Three: Still further, petitioner invoked the federal Health Act, 42 U.S.C.A. § 11101 *et seq.* — set forth in Appendix D of the Petition for Writ of Certiorari. Petitioner advised that said act mandated the California Business and Professions Code § 809, that the public policy for all states including California shall ensure fair peer review for physicians because it is " 'essential to preserving the highest standards of medical care,' while the lack of it 'results in harm to both patients and healing arts practitioners by limiting access to care.' " (Appendix A9)

Four: Beyond the above, and responding to a statement in Respondents' Brief in Opposition, Petitioner stated to the California Supreme Court in his Reply to Answer to Petition for Review, that "Petitioner *does* have a property right in the diagnostic equipment at Respondent hospital, because the exercise of his staff privileges at the hospital necessarily entails the use of that diagnostic equipment, and he has *a vested property*

right in those privileges . . ." (Emphasis added.) (Appendix B3 herein.)

II.

THE RESPONDENTS' DENIALS NOTWITHSTANDING, THE EVIDENCE (AND LAW) IS CONCLUSIVE THAT RESPONDENTS TERMINATED PETITIONER'S VESTED CLINICAL PRIVILEGES.

The Court of Appeal's denial that Respondents terminated Petitioner, is entirely fictitious. That court's denial crashes head-on against Petitioner's evidence, including Respondents' several compelling admissions that they did both and explicitly also in fact terminate Petitioner's exercise of his privileges, e.g., by excluding him from the only place where he could exercise them, the Department of Radiology! The Petitioner's Petition for Review (Appendix A6) states that "Even respondents admitted to appellant [in the Jenkins deposition, Vol. 1, p. 925] that he could not use the X-ray equipment and charge for it, and that he could not do diagnostic studies." Respondents made clear that the exclusion was entire, e.g., when they told Vineyard Medical Group that "Petitioner could provide neither 'outpatient nor inpatient radiological services' at Respondent's Hospital." (Appendix A6, CT 1117) Thus, in his Reply to Answer to Petition for Review, petitioner advised the California Supreme Court further that "Respondent's claim that Petitioner 'can still exercise' his privileges at Respondent hospital is patently false. . . ." (Appendix B5-6)

III.

NOTWITHSTANDING THE COURT OF APPEAL'S DENIAL: PETITIONER HAD BEFOREHAND SHOWN THAT COURT THAT RESPONDENTS ADMITTED THAT THEY TERMINATED PETITIONER'S CLINICAL PRIVILEGES AND THAT HE HAD THE RIGHT TO A HEARING. THEN, ON RECEIVING THE TENTATIVE OPINION TO THE CONTRARY, PETITIONER PROMPTLY PREPARED AND PROFFERED EXTENSIVE CORRECTIONS WHICH THE COURT REFUSED TO RECEIVE.

The falsity of the denial that Petitioner had a right to a hearing is shown further in Petitioner's statement in his Petition for Review to the California Supreme Court: "Ironically," stated Petitioner therein, "if the Court of Appeal had applied the requirements that such cases as *Centeno* and *Mateo-Woodburn* establish . . . as at one point the Appeals Court suggests that it does," Opn., pp 20-27, ". . . respondents' conduct could not have met even *that* more relaxed standard, for [those cases] make it clear that such action must not be targeted at a particular physician." (Emphasis added.) (Appendix A8)

IV.

REASONS FOR GRANT OF CERTIORARI

This Court should grant certiorari in order to establish authoritatively that the national public policy requires protection not only for the *form* of physician's hospital

privileges, but also for their *substance*: the right of a physician to *exercise* those privileges. This case offers a fine opportunity to fulfill the due process and equal protection requirements of the Constitution in the medical-hospital field and to stamp out egregious campaigns by hospitals to rid themselves of particular physicians or races without peer review through the use of exclusive contracting. (Appendix A3-5 herein) Grant of certiorari here is exceptionally meritorious also because the Court of Appeal extensively misreads the case law and also justifies the surreptitious destruction of the physician's privileges.

Shelley holds that a state court's denial of the fundamental rights of due process or of equal protection is of itself a state action violative of the Fourteenth Amendment. There was a time when no citation could have been supplied to this Court showing concretely that a *Shelley v. Kraemer* circumstance existed, to justify certiorari, *viz*, before the *Shelley* case happened. Yet the writ issued, and it stands to reason that here too, a unique complex of actions requires certiorari; namely, the combination of the above elements and, to emphasize,

a) the foregoing substitutions of fiction for fact,

b) the California court's opacity to the difference between exclusivity to occupy the Radiology Department and exclusivity to use it, leading to the mistaken conclusion that petitioner had a contract with exclusivity of use,

c) the Court of Appeal's mistaken view that the controlling California cases (Appendix A1-3 herein), show that petitioner did not have the right to a hearing for confiscation of his clinical privilege and that said cases did not merely aim at hospital membership, and

d) the ruling denying that Petitioner was terminated from his privileges by being terminated from their exercise.

The Petition for Writ of Certiorari should be granted.

DATED: October 26, 1994.

Respectfully submitted,

GERALD H. GOTTLIEB

Attorney for Petitioner
LAWRENCE F. BROWN, M.D.

APPENDIX A

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EXCERPTS FROM PETITION FOR REVIEW S039075

[Filed in the California Supreme Court April 4, 1994]

* * *

Appellant Lawrence F. Brown petitions this Honorable Court for review in the above-entitled matter after decision rendered by the Court of Appeal of the State of California, Fourth Appellate District, Division Two, on February 22, 1994. A copy of the opinion of the Court of Appeal is attached hereafter as Appendix A

* * *

NECESSITY FOR REVIEW

THIS COURT SHOULD GRANT REVIEW IN ORDER TO ENSURE THAT HOSPITALS CANNOT USE EXCLUSIVE CONTRACTS TO EVADE THEIR RESPONSIBILITY TO PROVIDE FAIR PEER REVIEW HEARINGS BEFORE DEPRIVING PHYSICIANS OF THE USE OF THEIR PRIVILEGES.

This Court has established through such decisions as *Anton v. San Antonio Community Hospital* (1977) 19 Cal.3d 802, *Westlake Community Hospital v. Superior Court* (1975) 17 Cal.3d 465, and *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, and the Courts of Appeal have elaborated in such cases as *Ascherman v. San Franciso Medical Society* (1974) 39 Cal.App.3d 623, *Ascherman v. Saint Francis Memorial Hospital*

(1975) 45 Cal.App.3d 507, *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648, and *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146, that physician's hospital privileges (as stated in hospital medical and corporate by-laws, including the by-laws of Respondent hospital) are fundamental vested rights protected by common law fair procedure and by the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution (*Ascherman v. San Franciso Medical Society, supra,* 39 Cal.App.3d 623, 644-45; *Sams v. Ohio Valley General Hospital Association* (4th Cir. 1969) 413 F.2d 826; and, *Marin v. Citizens Memorial Hospital* (S.D.Tex. 1988) 700 F.Supp. 354), and that hospitals cannot, therefore, terminate those privileges without a fair quasi-judicial hearing.

The continued vitality of that ramified and layered body of legal doctrine is now being put into question by the increasingly common practice of exclusive contracting, a practice by which physicians may be denied the ability to exercise their privileges simply because the hospital has used the ploy of giving someone else the exclusive right to use the facilities in their department.

Thus, under that body of doctrine, Petitioner had, in common with other physicians, a property and liberty right to exercise his privileges that was vested, fundamental, and inalienable except by due process or common law fairness hearing as made explicit by corporate and medical by-laws. A few Court of Appeal decisions can, however, be interpreted as having enunciated doctrine which tends — in clear violation of the jurisprudence of such decisions as *Anton v. San Antonio Community Hospital, supra,* 19 Cal.3d 802; *Miller v. Eisenhower Medical Center, supra,* 27 Cal.3d 614; and *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146 — to support these practices. They are

Centeno v. Roseville Community Hospital (1979) 107 Cal.App.3d 62; *Redding v. St. Francis Medical Center* (1989) 208 Cal.App.3d 98; and, *Mateo-Woodburn v. Fresno Community Hospital & Medical Center* (1990) 221 Cal.App.3d 1169.

Specifically, the Court of Appeal here has interpreted them to hold that no hearing is required to institute or continue the practice of exclusive contracting even though that practice may effectively deprive physicians of their privileges.

Respondent and the Court of Appeal here attempt to use these decisions to support rank fictions — construing them to hold that no hearing is necessary in such cases because (1) the physician does not actually *lose* his privileges, purportedly because the exclusive contract merely *excludes* him from places (such as operating rooms, emergency rooms and radiology departments, where they can exercise those privileges, and because (2) the decision is purportedly not personally directed against the excluded physician as is the case where privileges are revoked for unprofessional conduct or incompetence. *Mateo-Woodburn v. Fresno Community Hospital & Medical Center, supra,* 221 Cal.App.3d at 1187-88; *Redding v. St. Francis Medical Center, supra,* 208 Cal.App.3d 98 at 104.

But clearly, the exclusion of Petitioner from those places excludes Petitioner's exercise of those privileges, substantially or totally — an issue for trial. And the evidence is rife that the action was directed specifically against Petitioner, even though Respondents had no grounds for attacking his professional ability or conduct.

The fundamental problem with allowing hospitals to exploit exclusive contracts in this manner is, as the California Medical Association and California Association of Hospital and Health Systems have recognized, that they offer hospitals a ready means of circumventing

their obligations to respect physician's privileges as fundamental vested rights.

Thus, focusing on precisely the issue raised here, a 1992 joint statement the CMA and CAHHS found it necessary to unmask the fiction and warn that "exclusive contracts should not be used as a vehicle to preempt medical staff peer review" (Joint Statement on Economic Credentialing and Exclusive Contracting" by the California Medical Association and California Medical Association and California Association of Hospital and Health Systems, January, 1992, at page 3).

A 1991 report, "Exclusive Contracts and Economic Credentialing" of the Task Force on Exclusive Contracting and Economic Credentialing, California Medical Assn. at page 14, was even more explicit, noting that hospitals which have concerns about particular physicians may evasively "choose to close the department via an exclusive contract rather than go through any formal procedures, leaving those physicians without a contract also without privileges."

On the basis of these concerns, the CMA Model Medical By-Laws now protect the physicians — and give the right to a hearing to physicians "whose privileges may be adversely affected" by the hospital's decision to institute, continue, or transfer an exclusive contract.

The CMA's understanding that because a physician "without a contract" will be left (by the hospital which has allowed the contract to expire) "also without privileges" and that physicians must, therefore, have the right to a hearing before an exclusive contract adversely affects them, cuts through to the central fiction on which such decisions as *Centeno* and *Mateo-Woodburn* (as construed by the Court of Appeal) are purportedly based. The Court of Appeal cites *Mateo-Woodburn*, for example, which states that hospitals deprive no one of their

privilege though its exclusive contract "results in the exclusion of certain doctors from the operating rooms" 221 Cal.App.3d at 1185. On this dubious theory, adopted by the Court of Appeal here, the privileges are made to seem to exist though the physician has lost the means of exercising them.

The CMA report and CMA-CAHHS joint statement show that while such a triumph of fiction and form over substance and truth may satisfy that court's interest in maintaining formal consistency with abstract doctrine, it cannot satisfy the practical need of physicians for protection of their privileges, or of courts concerned with the real world objectives of good medicine.

The instant case shows the extent to which the concerns of the CMA and CAHHS are justified. Petitioner here is a radiologist who alleges that the hospital management deliberately set about to deny him the exercise of his privileges by awarding the exclusive right to use the radiology facilities to another physician (see Petition for Rehearing, p. 5). The case demonstrates the evils of indulging in fictions to permit the unjust forfeitures of vested clinical privileges.

The Court of Appeal, in upholding the grant of summary judgment against Petitioner, took the case (but only as the result of the error of assuming that Petitioner had an exclusive contract before the hospital ousted him, though he in fact had no exclusivity of use, [see PRH 2-3]) as involving the transfer of an exclusive contract (Opn., p. 28), a situation not previously considered in a published opinion.

The court, following *Centeno* and *Mateo-Woodburn*, held the action not to be a removal of privileges because Petitioner still *had* his privileges. Quoting *Centeno* to the effect that a physician still has his privileges when he is "only precluded from using *some* of the hospital's facilities" (107 Cal.App.3d at 75) and *Mateo-*

Woodburn's statement that "the exclusion of certain doctors from operating rooms" does not require a hearing (221 Cal.App.3d at 1185), the Court of Appeal concluded mistakenly that Petitioner's privileges remained intact despite his exclusion from "some of the hospital's facilities" (Opn., p. 30).

In fact, Petitioner was excluded from the only hospital facilities in which he, as a radiologist, could exercise his privileges. Even Respondents admitted to Appellant that he could not use the X-ray equipment and charge for it, and that he could not do diagnostic studies (Jenkins Depo., Vol. 1, p. 92). Respondents also made totally clear the fact that the exclusion was total when they told Vineyard Medical Group that Petitioner could provide neither "outpatient or inpatient radiological services" at Respondent hospital (CT 1117).

In principle, of course, whether a physician is totally or only partially excluded from the use of the facilities he needs to practice his specialization, the result is the same: he is deprived of the ability to exercise his vested rights to the extent of the exclusion. As the court said in *Applebaum v. Board of Directors, supra*, 104 Cal.App.3d 648 at 658, "we do not find that a partial exclusion of this magnitude [involving 40% of Applebaum's practice] merits any less procedural protection than revocation of full staff membership." Even if Petitioner's exclusion were partial (and it admittedly was total), therefore, it was admittedly so extensive that, in practical terms, it rendered whatever was left of Petitioner's privileges at Respondent hospital meaningless. The court below, purporting to build on *Centeno* and *Mateo-Woodburn* (though in fact, as will be shown below, disregarding the protections which even they establish) went so far as to decide that a transfer of an exclusive contract is not an occasion requiring a quasi-legislative decision, because it involves no change in

policy, only a change in personnel. As such, there was no need for the decision to be substantively rational, in accordance with public policy or procedurally fair (Opn., p. 28). In the court of appeals' view, the hospital was free in this situation to act untrammeled by any fiduciary or other duty to respect Petitioner's rights (Opn., p. 24).

This groundless holding extends and distorts even the fictional reasoning of the *Centeno* line of cases. The Court of Appeal interprets *Centeno* and the courts following it as not requiring "a judicial-type hearing" in quasi-legislative decision-making because in such proceedings, the "doctor's professional or ethical qualifications for staff privileges" are *not* in question. *Mateo-Woodburn v. Fresno Community Hospital & Medical Center, supra*, 221 Cal.App.3d at 1185. Here, however, though taking the hospital's action to have involved a choice between particular physicians in which Petitioner was rejected because he was no longer the "appropriate" person for the radiology department (Opn., p. 6), the Court of Appeal held the action entirely exempt from *any* requirement of fair procedure.

Thus, the Court of Appeal here has, through the extension of the fictional reasoning of such cases as *Centeno* and *Mateo-Woodburn*, enforced Respondent hospital's forfeiture of Petitioner's vested property right in his staff privileges without due process of law, in violation of the Fourteenth Amendment to the United States Constitution. *Shelley v. Kraemer* (1948) 334 U.S. 1. As in *Shelley*, Petitioner, a black physician, has asserted that Respondent acted on racial motivation to deprive him of his property rights, and the Court of Appeal here, through is fictional findings that Respondent did not terminate Petitioner's staff privileges, and that Petitioner was not entitled to a hearing, has validated that deprivation.

Earlier uses of fiction as the basis for forfeiture, as in outlawry and corruption of blood, were barred by the Constitution from the outset. Here a novel use of fiction for the purpose of validating the forfeiture of a physician's vested property and liberty rights in his privileges compels the application of the *Shelley*. (Carl Joachim Friedrich, "Confiscations," *Encyclopedia of the Social Sciences*, [1931] 1st ed., vol. 4, pp. 183-187; Blackstone, *Commentaries on the Laws of England*, [1916] vol. II, book 4, p. 2625, note 3.)

Ironically, if the Court of Appeal had applied the requirements hat such cases as *Centeno* and *Mateo-Woodburn* establish for quasi-legislative decisions (as at one point it suggests that it does, Opn., pp. 26-27), Respondents' conduct could not have *met even that more relaxed* standard, for they make it clear that such action *must not* be targeted at a particular physician.

Here, Respondents' every action was targeted at ousting Petitioner. They started with efforts to remove Appellant from board membership behind his back (CT 1063-66), and included stacking the committee charged with finding a replacement with a majority of members biased against him (Forrester Depo., Vol. 1, p. 159, CT 1686). They structured the committee so that almost its entire membership interlocked and overlapped with that of the NME Board of Governors and Executive Committee (see CT 1064, 1070-71). They excluded Petitioner from the meeting at which the critical decision was made against him (AOB 15-16), among many others. In the words of the court in *Rosenblitt v. Superior Court* (1991) 231 Cal.App.3d 1434 at 1448, the hospital was "dedicated to removing ... rather than providing a physician with a fair opportunity to defend" himself.

This case, then, offers a particularly forceful demonstration of how exclusive contracts are increasingly being used to defy and sap the vitality of the protections

this Court has given physicians against arbitrary loss of privileges.

The CMA and CAHHS have already stated the need for precautions against the dangers which exclusive contracts pose to the guarantees of fair peer review which doctors believe were made in good faith, culminating in the CMA model by-law requiring a hearing whenever a physician is adversely affected by the institution, continuation or transfer of exclusive contracts. But the issue raised here is not solely one of interest to physicians. Business and Professions Code § 809, (mandated by 42 U.S.C. § 11101) states it to be the public policy of California that fair peer review for physicians is "essential to preserving the highest standards of medical care," while the lack of it "results in harm to both patients and healing arts practitioner by limiting access to care."

* * *

Even Respondent hospital's by-laws reflect an understanding that the form of the privileges is worthless without their substance. They protect, not merely the privileges as such, but their *exercise* (By-Laws of the Medical Staff of Doctor's Hospital of Montclair, ¶ 7.1, Exh. 30 in Volume 2 of Response to Motion for Summary JT).

If hospitals continue to use exclusive contracting to deprive physicians of the right to exercise their privileges without the fair procedures mandated by this Court and the Legislature to protect physician's property rights in those privileges, the body of law requiring those procedures will gradually become no more than an empty promise in those departments, such as radiology, anesthesiology and emergency medicine, where exclusive contracts have become common.

By grating review here, and holding that hospitals must not use exclusive contracts to deprive physicians of the substance of their privileges without fair peer review, this Court can halt that law-decaying process.

CONCLUSION

The opinion below (Appen., p. 34) stated that the appeal here is "perilously close" to being frivolous. Only a court willing to indulge in fictions which take the empty form of privileges for their substance could regard it as frivolous to assert, as Petitioner does here, that a radiologist is deprived of his vested property right to practice medicine at a hospital when he is denied access to the radiology equipment.

Once it is clear that the Court of Appeal here has followed and exaggerated a questionable line of decisions to justify the surreptitious destruction of the physician's privileges which this Court and other California courts have so often stated to be fundamental — vested property rights — there can be no doubt that the appeal is exceptionally meritorious. In it, Petitioner seeks only to invoke the protection of the body of law this Court has created to protect his privileges and those of other physicians, and to vindicate that body of law against a countertrend which threatens to rob it of its vitality. The appeal therefore requires this Court's right-saving intervention.

* * *

APPENDIX B

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EXCERPTS FROM REPLY TO ANSWER TO PETITION FOR REVIEW

* * *

II.

RESPONDENTS MISSTATE THE FACTS TO MAKE IT APPEAR THAT PETITIONER IS COMPLAINING ABOUT THE FAILURE TO RENEW AN EXCLUSIVE CONTRACT.

* * *

That is not so. Petitioner does not assert any rights under the expired contract, but that his property right to maintain his hospital staff privileges remain unimpaired except in accordance with due process of law. The 1985 contract gave Petitioner the status of "Physician Advisor" and the duties attendant to it (CT 793, et seq.), but it was his status as a member of the hospital staff with full staff privileges which gave him the right to use the radiological equipment and provide radiology services at the hospital, and the termination of the contract had no impact on that status.

Respondents also assert disingenuously that Petitioner had an exclusive right to provide services in Respondent hospital's radiology department between 1977 and 1987 under a series of written contracts "all following *almost* identical form" (APR 4; emphasis added).

Respondent is, however, well aware that the 1985 contract between Petitioner and Respondent hospital was crucially different from those which came before it, in that it did not give Petitioner exclusivity of use of the radiology facilities as the previous contracts had (see PRH 2-3).

While Petitioner's 1977 and 1980 contracts stated that Appellant was not to suffer anyone else to use *or* occupy the facilities (CT 833, 839), the 1985 contract presented to him by Respondent stated only that he should not suffer anyone else to *occupy* them (CT 808), omitting exclusivity of *use*.

That Respondent intended this change in the contract language to have substantive force is further shown by the fact that, as noted, Appellant's title as stated in the contract was changed from "Director and Manager" in 1980 (CT 834) to "Physician Advisor" in 1985 (CT 793). There was further evidence of the significance of this elimination from the contract of exclusivity of use in the Layne-Smith memorandum, which demonstrates Respondent's concern about the anti-trust implications of exclusivity in 1985 (Response to Summary Judgment Motion, Vol. 2, Exh. 5).

III.
PETITIONER ASKS THIS COURT TO ENSURE, IN THE WORDS OF THE CMA'S WARNING, THAT EXCLUSIVE CONTRACTS CANNOT BE "USED AS A VEHICLE TO PREEMPT MEDICAL STAFF PEER REVIEW."

Respondents' claim that Petitioner asks this Court to prohibit hospitals from making exclusive contracts (APR 4) is baseless. The Petition focuses on the way in which exclusive contracting deprives physicians of the use of their privileges without resort to the due process protection this Court and Courts of Appeals following it have established for physicians' privileges in such cases as *Anton v San Antonio Community Hospital, supra*, 19 Cal.3d 802; *Westlake Commuity Hospital v. Superior*

Court, supra, 17 Cal.3d 465; *Miller v. Eisenhower Medical Center, supra*, 27 Cal.3d 614; *Ascherman v. San Franciso Medical Society* (1974) 39 Cal.App.3d 623; *Ascherman v. Saint Francis Memorial Hospital* (1975) 45 Cal.App.3d 507; *Applebaum v. Board of Directors* (1980) 104 Cal.App.3d 648; and, *Bergeron v. Desert Hospital Corp.* (1990) 221 Cal.App.3d 146.

Here, the impact of exclusive contracting on staff privileges is shown in its gravest form: Respondent hospital entered into its exclusive contract with Dr. Shapiro as the means of implementing its deliberate effort to oust Petitioner from the hospital (PR 9, CT 1063-66, 1070-71; Forreter Depo., Vol. 1, p. 159; CT 1686, 1070-71; AOB 15-16), depriving him entirely of the ability to practice his specialty of radiology there (PR 6). He was thus deprived of the right to *exercise* his privileges granted by the hospital by-laws (PR 11-12) and guaranteed by the jurisprudence of this Court without the benefit of the quasi-judicial hearing which that jurisprudence requires, and indeed, without the benefit of common law fairness or any by-law prescribed procedure.

* * *

Respondents contend that Petitioner's claim to a "property right or interest in the diagnostic equipment of the Hospital" must give way before the "long line of authority" which permits hospitals to enter into exclusive agreements (APR 5).

Petitioner *does* have a property right in the diagnostic equipment at Respondent hospital, because the exercise of his staff privileges at the hospital necessarily entails the use of that diagnostic equipment, and he has a vested property right in those privileges. Under the decisions of this Court, Respondent hospital is the trustee of a public trust to protect those privileges and their use, and to ensure that he is not deprived of them, and that his use

of them is not impaired, except in accordance with due process of law.

Further, the cases in Respondents' supposed "long line" of authority, of which Respondents cite *Blank v. Palo Alto-Stanford Hospital* (1955) 234 Cal.App.2d 377, *Lewin v. St. Joseph Hospital of Orange* (1978) 82 Cal.App.3d 368, *Centeno v. Roseville Community Hospital* (1979) 107 Cal.App.3d 62, and *Redding v. St. Francis Medical Center* (1989) 208 Cal.App.3d 98 (APR 5-6), do not give the decision of the Court of Appeal below the kind of unequivocal support Respondents claim for them.

Thus, the hospital's fiduciary duty to protect the physician's privileges was not even at issue in *Blank*; the *Lewin* court found the procedure there, including notice and an opportunity for the physician to be heard, to be fair, and took into account the fact that the plaintiff's loss of the ability to exercise his privileges had no economic impact on him (82 Cal.App.3d 368, 388, 392). *Centeno* did not involve a termination such as that imposed here, but a physician's own decision to leave a partnership, making him an outsider applying for staff membership (107 Cal.App. 62, 66-67), and the court there found that the hospital had gone through an appropriate quasi-legislative process before closing its radiology department (107 Cal.App.3d 62, 73-74). The *Redding* court also found appropriate quasi-legislative action and, in addition, made the point that such a process does not require a quasi-judicial hearing because it is not "directed specifically toward the exclusion of a particular physician" (208 Cal.App.3d 98, at 104).

Here, of course, the evidence shows that Respondent hospital's action was aimed at a particular physician: Petitioner (see PR 9; CT 1063-66, 1070-71; Forrester Depo., Vol. 1, p. 159; CT 1686, 1070-71; APB 15-16). Further, the fact that Respondent hospital's claim to

have exercised "administative discretion" in entering the exclusive contract with Dr. Shapiro was based solely on Dr. Forrester's conclusory declaration (Opn., p. 11-12) is a virtual admission that there was no quasi-legislative process here.

The danger of this line of cases is that it can be interpreted, as the Court of Appeal interpreted it here, to support the *fiction* that a physician's privileges remain unscathed when a hospital uses an exclusive contract to bar that physician in whole or part from the practice of his specialization at the hospital PR 4).

When that fiction is used, as it was here, to allow a hospital to use the device of exclusive contracting to deprive a physician of the use of his privileges *unchecked by any requirement of fair procedure* (PR 8), and despite Petitioner's showing that he was personally targeted for removal (see PR 9, CT 1063-66, 1070-71, Forrester Depo., Vol. 1, p. 159, CT 1686, 1070-71, AOB 15-16), it can only result in the *effective nullification* of the due process and common law fairness protection this Court has established for hospital staff privileges in such cases as *Anton v. San Antonio Community Hospital, supra*, 19 Cal.3d 802; *Westlake Community Hospital v. Superior Court, surpa*, 17 Cal.3d 465; and, *Miller v. Eisenhower Medical Center, supra*, 27 Cal.3d 614. This Court must grant review here to ensure their continued vitality.

The question put by the Petition, then, is whether the "long line of authority" which Respondents claim to support the hospital's right to enter into exclusive contracts can also justify a hospital's use of exclusive contracts to evade their fiduciary responsibilities to protect physicians' privileges in accordance with due process of law.

Ironically, Respondents end their argument with a repetition of the claim that Petitioner "can still exercise

his medical staff membership and clinical privileges at Respondent Hospital" (APR 9).

That claim is belied by the record.

Respondents do not explain how Petitioner, as a radiologist, can still exercise his privileges when, as the record shows, Respondent hospital prevents him from using the X-ray equipment, prevents him from doing diagnostic studies (Jenkins Depo., Vol. 1, p. 92) and more generally prevents him from providing either "outpatient or inpatient radiological services" at Respondent hospital (CT 1117).

Respondents' claim that Petitioner "can still exercise" his privileges at Respondent Hospital is patently false. The only explanation for it is that Respondents continue to insist that Petitioner retains his privileges and the right to "exercise" them at Respondent hospital in some formal, fictional sense, though Respondent hospital has barred him from the use of the very equipment necessary to the practice of his specialization.

It is precisely the fictive thinking embodied in Respondents' closing statement which this Court must confront if it is to maintain the integrity of its decisions in *Anton v. San Antonio Community Hospital, supra*, 19 Cal.3d 802; *Westlake Community Hospital v. Superior Court, supra*, 17 Cal.3d 465; and, *Miller v. Eisenhower Medical Center, supra*, 27 Cal.3d 614. Respondents' own words demonstrate that granting review here will be an excellent means of doing so.

* * *

APPENDIX C

BEST AVAILABLE COPY

EXCERPTS FROM OPPOSITION TO MOTION FOR SUMMARY JUDGMENT/ADJUD. OBJECTIONS TO EVIDENCE DECLARATIONS, COUNTERSTATEMENTS; SEPARATE STATEMENT OF DISPUTED FACTS AND ISSUES; MEMORANDUM OF POINTS AND AUTHORITIES; REQUEST FOR SANCTIONS

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, on May 1, 1991, CT 895 lines 21-27]

* * *

Plaintiff's : . . . .

(3) Opposition to Defendants' Motion for Summary Adjudication or Summary Judgment: Plaintiff's separate statements showing that each of Defendants' facts or issues is irrelevant, untrue, and involves substantial dispute.

* * *

[CT 957 lines 2-20]

REFUTATION:

Defendants are not entitled to judgment or adjudication.

Plaintiff has declared, in Answers to Interrogatories, as follows:

Page 2: "He along with the other member physicians was under the protection of the fiduciary duties owed to him as a member of the hospital and holder of clinical privileges. He was also under the protection of the medical staff bylaws and of the "due process" standards which the corporate defendants have admitted are built into the bylaws. Document 25B, Agreement of Dec. 1, 1980, clause Nineteenth. He and the other staff

members were also under the protection of the NME Corporate Bylaws such as Article VIII Section 7 which here prevents the termination of a physician-NME service contract from terminating that physician's privileges. Document 76. [Exhibit 17 hereof]

Page 16: The "... termination of plaintiff was summary: defendants permitted no hearing or other compliance with bylaw or due process or fiduciary obligations.

* * *

[CT 958 lines 23-28; 959 lines 1-28]

Page 59: "4. Forrester promised tenure and bylaw protection to plaintiff in late 1986, and plaintiff relied by remaining; details follow:

"(a) In 1980 an agreement by NME with plaintiff included a provision that in the event that the quality of services of the physician be challenged, plaintiff would be entitled to proceed under the bylaws and under the due process protection afford thereby — irrespective of other proceedings such as within the Board of Governors. The provision admits that plaintiff was under bylaw protection.

"That paragraph, number 19 of the 1980 instrument also confirms that the defendant NME's bylaws have a due process quality.

"(b) when the 1985 "agreement" was drafted by NME, that entire Paragraph Nineteen was omitted. Plaintiff protested. Forrester promised that he would have the paragraph reinserted. A year passed. No word on the matter was heard. Meanwhile plaintiff was practicing and directing radiology in the Department with no contract at all, but simply on the strength of his clinical privileges and of an implied agreement which formed in consequence of the circumstances.

"(c) when Forrester at last returned with the instrument, nothing had been added. The due process clause was still omitted. Plaintiff again objected. Forrester told plaintiff to pay no heed to that omission; he assured and represented to plaintiff that irrespective of any instrument, his position and post were secure and were protected by the bylaws. Plaintiff believed the assurance and representation — and believed that his was a career-long situation — thus confirmed to him by Forrester — and plaintiff relied thereon by remaining."

"5. The Medical Staff Bylaws protect every other physician and hospital member and grantee of clinical privileges.

"6. The NME corporate bylaws protect plaintiff against loss of clinical privilege in the circumstance of an expiration.

* * *

[CT 995 lines 3-12]

There are many other issues that . . . require and merit trial.

As examples — one disputed issue under each of the six causes of action of the attached Amended Complaint (in Volume Two): 1--Whether the property and liberty right that is owed by the hospital-as-fiduciary to its physician-hospital member is deemed to be protected where the hospital refrains from striking his clinical privileges from his file but ousts him from the department so that he can no longer practice or exercise those privileges.

* * *

[CT 1018 lines 2-4]

The defendants' motion for summary judgment and its several motions for summary adjudication should be denied.

* * *

APPENDIX D

BEST AVAILABLE COPY

EXCERPTS FROM PLAINTIFF'S RESPONSE TO OBJECTIONS TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JT. ABBREVIATED SEPARATE STATEMENT, ETC.

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, on May 28, 1991, CT 1349 lines 21-25]

IN RESPONSE TO DEFENDANTS' OBJECTIONS:

Responding to Defendants' objection as to form, Plaintiff adds a clarifying and abbreviated response in separate statement form using columns as now prescribed by the local rules.

* * *

[CT 1367 lines 1-12]

PLAINTIFF'S SEPARATE STATEMENT OPPOSING DEFENDANTS' ASSERTION OF "ISSUES UNDISPUTED, UNCONTROVERTED, AND MATERIAL"

FIRST "UNDISPUTED ISSUE": Defendants assert, as if the "issue" were "without substantial controversy," that: "Since the 1985 Agreement between Plaintiff and the Hospital whereby Plaintiff was to act as Director of the Radiology Department expired pursuant to its express terms, Plaintiff cannot assert any cause of action or claim based upon the nonrenewal of the agreement between Plaintiff and Defendant. (Fact Nos. 1-7)"

FIRST "ISSUE": DISPUTED:

* * *

[CT 1370 lines 20-27]

6. PROTECTING PLAINTIFF: The defendants *admit* that the bylaws *protect plaintiff*, as also does the protection of the standard of due process which the bylaws embrace. Exhibit 22; Exhibit 5. Exhibit 3 shows the admission that the bylaws apply to plaintiff and that they embrace the "due process" standard, in Clause Nineteen of the 1980 Agreement between defendant corporations and plaintiff. Leyhe Deposition testimony, pp. 59, 137 et seq.; . . .

* * *

[CT 1371 lines 10-19]

8. NME ADMITS: Forrester and Leyhe admit that the membership and privileges are unalienable and therefore require *adherence* to the rights and requirements of bylaws and due process for any stripping of clinical privileges from a member-physician. National Medical Enterprises and its subsidiary have previously admitted this in the text, referred to above, which they wrote as Clause Nineteenth of the 1980 agreement, Exhibit 3. Answers to Interrogatory #1 pp. 30-31 & Interrogatory #21 p. 66, and Exhibit 25, Exhibit 22 and Exhibit 23.

* * *

[CT 1381 lines 9-18]

k. The defendants knew they were breaking the law, and admitted, effectively, that nothing in that "contract" permitted them to bar plaintiff from Radiology and thus from his privileges. Baldly ***the defendants in the same letter, from Forrester and his assistant Surowitz to plaintiff, on 2-15-87, advise him that they have selected Shapiro, and (in the next paragraph) that plaintiff's privileges are "intact" and could not be removed except by procedures under the bylaws which had not been***

done or activated. (Exhibit 25). The admissions by Messrs Forrester, Surowitz, and Leyhe, that the privileges could not be removed except by full hearing and due process procedures as prescribed, are found not only in that second paragraph, but also in the Leyhe testimony. *Supra* The assertion by the defendants is worse than hollow.

* * *

[CT 1399 lines 13-27; 1400 lines 1-3]

. . . The summary adjudication judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should not be used except with great caution. Cf. *Mann v. Cracchiolo* (1985) 38 Cal 3d 18. And the United States Constitution, Amendment 14, itself, becomes part of the caution, by its provision of the ancient right: ". . . nor shall any State deprive any person of . . . liberty or property, without due process of law." *Logan v. Zimmerman Brush Co.*, 455 US. 422 (1982), including the right to and protection of a trial — a right reaching all the way back to Article 39 of Magna Carta. The affidavits of the moving party should be strictly construed, and those of the opponent liberally construed. Any doubts as to the propriety of granting the motion should be resolved in favor of the party opposing the motion. *Fragomeno v. Insurance Co. of the West* (1989) 207 Cal.App.3d 822. Determination of a motion for summary judgment necessarily begins with reference to the issues framed by the pleadings. *Twaite v. Allstate Ins. Co.* (1989) 216 Cal.App.3d 239. . . .

APPENDIX E

BEST AVAILABLE COPY

EXCERPTS FROM VOLUME TWO OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION DECLARATION OF PLAINTIFF — REGARDING EXHIBITS COMPILED AND ATTACHED BENEATH THE DECLARATION

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, dated April 30, 1991, CT 1405 lines 21-27; 1406 lines 1-23]

DECLARATION OF PLAINTIFF LAWRENCE F. BROWN, M.D., IN REGARD TO EXHIBITS REFERRED TO IN VOLUME ONE AND COMPILED HERE.

I, LAWRENCE F. BROWN, M.D. declare and state as follows:

I am the plaintiff in the above-entitled case.

I received the following Exhibits on approximately the dates shown thereon. They are genuine copies of the originals, viz.:

Exhibit 2, documents granting me clinical privileges;

Exhibit 3, the Agreement between defendants and myself dated December 1, 1980;

Exhibit 5, the memorandum from Chief Corporate Council Layne on proscribed activities under the antitrust laws; Mr. Layne addressed it to corporate officer Smith, and copies were directed, as the document shows, to the NME Montclair Hospital Executive Committee. I received it as a member thereof.

Exhibit 6, the Williams letter to Duran. I received a copy of the Williams letter after several conversations with Mr. Williams regarding his recommendation of me;

Exhibit 8, parts of the Craig contract with the Hospital (Forrester's assistant Donna Dye brought it to me; I do not remember the date;

Exhibit 9, the 1985 "contract" purportedly between myself and the corporate defendants; Forrester brought it to me first on December 1, 1985;

Exhibit 11, the NME corporate Bylaws, which I received at a Board of Governors meeting on the approximate date when the set was issued;

Exhibit 16, the termination letter from Forrester to me; Exhibit 25, a letter from Forrester, signed by his assistant Surowitz, to me, assuring me that my privileges were intact;

* * *

[CT 1407 lines 1-7 and lines 16-21]

Exhibit 30, the Medical Staff Bylaws, which I received at one of the Executive Committee Meetings. Being president, I signed the bylaws, as my signature at the end shows.

Exhibit 35, the Board Minutes of November 5, 1985, which showed my reelection to the Board for a third term. I did not know at the time that Forrester had urged that I not be reelected.

* * *

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Executed this 30th day of April, 1991.

/s/ LAWRENCE F. BROWN M.D.

APPENDIX F

BEST AVAILABLE COPY

EXCERPTS FROM DECLARATION OF LAWRENCE F. BROWN, M.D.

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, dated May 12, 1990, CT 1420 lines 23-25]

I, Lawrence F. Brown, M.D., declare:

* * *

[CT 1428 lines 8-15]

15. Referring to page 46 of my Opposition to the Motion for Summary Judgment, the wording of Clause Nineteenth of the 1980 Agreement regarding the bylaws, represents that I was under the protection of the bylaws and that the bylaws incorporate the due process standard. I knew of this representation and relied on it, and also on Forrester's assurance and promise that I was secure and had the protection of those bylaws, and could not be removed without action under the bylaws and thus had tenure.

* * *

[CT 1434 lines 9-16]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 12th day of May, 1990, at Los Angeles.

/s/ Lawrence F. Brown, M.D.
Lawrence F. Brown, M.D.
Declarant

APPENDIX G

BEST AVAILABLE COPY

EXCERPTS FROM NOTICE OF LODGING OF CERTIFIED COPIES OF DEPOSITIONS

[Filed in San Bernardino Superior Court, Case No. RCV 470-45, dated May 1, 1991, CT 903 lines 19-28]

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that certified copies of the original of the depositions of Kevin Jenkins, M.D. Volumes I and II, and of Richard Forrester, Volumes I and II, and William Leyhe, are today lodged with the court and the originals of that deposition will be available at the time of the hearing of the above motion.

DATED: MAY 1, 1991

Respectfully submitted,

/s/ Gerald H. Gottlieb
Gerald H. Gottlieb,

Attorney for Plaintiff

APPENDIX H

BEST AVAILABLE COPY

COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO

LAWRENCE F. BROWN, M.D.,
Plaintiff,

vs.

NATIONAL MEDICAL ENTERPRISES, INC.; NME HOSPITALS, INC. dba Doctors' Hospital of Montclair; KEVIN JENKINS, D.O., DOES 1 through 10, inclusive; ROES XI through XX, inclusive,

Defendants.

Docket No. 4th Civ. E010073
Super. Ct. No. RCV 470-45

NOTICE OF LODGING OF DOCUMENTS
IN RE ORAL ARGUMENT AND
DECLARATION IN SUPPORT THEREOF

TO ALL INTERESTED PARTIES HEREIN AND TO THE ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that the documents listed hereinabove are being submitted for lodging in support of plaintiff's oral argument presently scheduled in this matter in the above-entitled Court for February 2, 1994. These documents are being lodged with this Court because of the refusal of the superior court to transmit them to this Court under Rule of Court 10(d) as described in the attached Declaration of Lisa L. Ervin:

1. "Volume Two of Response to Motion for Summary JT Table of Exhibits;"

2. Volume I of Transcript of Deposition of Kevin Jenkins, D.O., taken on Nobemnber [*sic*] 15, 1988;

3. Volume II of Transcript of Deposition of Kevin Jenkins, D.O., taken on Nobemnber [*sic*] 2, 1989;

4. Volume I of Exhibits to Deposition of Kevin Jenkins, D.O., taken on Nobemnber [*sic*] 15, 1988;

5. Transcript of Deposition of William Lehye, taken on November 22, 1989; and,

6. Volume II of Transcript of Deposition of Richard G. Gorrester, [*sic*] taken on October 31, 1989.

Copies of these documents are in the possession of all parties to this action, and so are not served with this notice.

Dated: January 31, 1994

/s/ Gerald H. Gottlieb
GERALD H. GOTTLIEB,
Attorney for Plaintiff and Appellant
LAWRENCE F. BROWN, M.D.